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May 24, 2007

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Ex Parte

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloops, WC Docket No. 01-338

Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184

Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring, MM Docket No. 92-260

Dear Ms. Dortch:

Based on conversations yesterday and today with Michelle Carey, Legal Advisor to Chairman Martin; Rick Chessen, Senior Legal Advisor to Commissioner Copps; Cristina Chou Pauzé, Legal Advisor to Commissioner McDowell; and Rudy Brioché, Legal Advisor to Commissioner Adelstein, we understand that parties representing the cable incumbents have raised several issues, not yet reflected on the record, concerning the above-captioned proceeding. These issues include: (1) what would happen, under the cable home wiring rules, if a subscriber cancelled cable service from an incumbent cable operator but desired to continue receiving other services, such as voice or cable modem service, from that provider; (2) what would happen under the rules if the subscriber subsequently sought to switch back to the incumbent cable operator for purposes of cable service; and (3) whether the current Commission rule recognizing that the demarcation point for purposes of access to cable home wiring may not be located behind sheet rock walls and ceilings eviscerates the Commission's separate rules addressing cable home run wiring.

As an initial matter, these particular issues concerning the operation of the Commission's current cable home wiring rules are not presented in this proceeding. Instead, the Further Notice of Proposed Rulemaking addresses only the narrow issue – remanded by the D.C. Circuit – of whether wiring located behind sheet rock should be considered “physically inaccessible” for purposes of determining the demarcation point for cable home wiring.¹ The Commission previously concluded that accessing the

¹ See Further Notice of Proposed Rulemaking, *Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring, MM Docket No. 92-260* (rel. Sep. 29, 2004) (“Further Notice”).

demarcation point should not require a competitive provider to cut into sheet rock walls and ceilings – something that can be difficult, disruptive, expensive and in many cases impossible (given the unwillingness of MDU owners and managers to permit such activities) – in order to access the demarcation point for cable home wiring, and the Commission should reaffirm its current rule that does not require competitors to do so. The questions raised by cable incumbents, on the other hand, concern the operation of the cable home wiring rules more generally, regardless of where the demarcation point is located.

The answer to all three of these issues raised by the cable incumbents is provided by the current wiring rules, rather than anything in play in this proceeding. The current cable home wiring rules already address the issue of who controls the home wiring after a subscriber terminates cable service. *See* 47 C.F.R. § 76.802. Under these rules, a cable operator that owns the home wiring loses ownership and control of the wiring unless – at the time that the subscriber calls to terminate cable service – the cable operator offers to sell the wiring to the subscriber (or, with reasonable advance notice, an MDU owner or alternative provider, if permitted by the MDU owner) at replacement cost. *Id.* §§ 76.802(a)(2), (b), & (e). If the cable operator fails to take that step, or if the subscriber agrees to purchase the wiring, the original cable operator immediately loses ownership and control over the wiring. *Id.* Moreover, if the subscriber is not interested in purchasing the wiring when asked (and neither the MDU owner nor an alternative provider has provided notice of a willingness to do so), then the cable operator must remove the home wiring with seven days, or it also loses ownership and control of the wiring. *Id.* § 76.802(a)(2).

In light of these rules, the answer to first question – concerning the offering of non-cable services by the incumbent – is that, given the inability of two providers to both use the same wiring, it would generally be up to the individual subscriber (or the MDU owner, if it purchased acquired ownership of the wiring) to determine which provider could use the existing home wiring to offer their services (whether cable services or otherwise). Assuming the subscriber owns and controls the wiring either because of the incumbent abandoned it or sold it, the subscriber could decide whether it prefers to allow the incumbent to continue using the wiring for purposes of providing other services, or whether the subscriber instead would permit the alternative video provider to use that wiring for the provision of video or other services. And the provider on the losing end of that decision would have no choice but to run additional wiring to the subscriber, if possible, to provide its own services – whether those services are video, voice, Internet access or otherwise or to forgo offering services to that subscriber. Of course, if an alternative provider purchased the cable wiring, when permitted by the MDU owner, then that provider would have the right to offer its services over the cable wiring.

As for the second issue – concerning the operation of the rules if a subscriber decides to switch back to an incumbent provider for purposes of receiving cable services – the current rules would again generally give the subscriber (or MDU owner) ownership and control of the home wiring, and the subscriber (or MDU owner) would be free to allow the incumbent cable operator to re-connect to the home wiring at the demarcation point. If an alternative video provider had acquired ownership of the home wiring by paying the replacement cost at the time of the original termination of cable service by the subscriber, then that provider would be subject to the same rules discussed above. Therefore, the original provider would be able to access the wiring unless no one agreed to pay the replacement cost of the wiring to the alternative provider and that provider removed the wiring within seven days – presumably, a rare occurrence.

Finally, the current FCC rule recognizing that wiring located behind sheet rock is “physically inaccessible,” for purposes of determining the demarcation point for the home wiring, does not undermine the Commission’s separate home run wiring rules. *See* 47 C.F.R. § 76.804. As is the case today, those rules would continue to apply to any wiring running between the demarcation point – wherever that point may be – and the place where the wiring becomes devoted to a particular individual subscriber. *Id.* § 76.800(d). So, for example, if wiring is not located behind sheet rock at the point 12 inches outside of a unit but is instead accessible to other providers, then the wiring from that point to the incumbent’s junction box would still be home run wiring subject to Section 76.804. On the other hand, if wiring is located behind sheet rock (or any other material that makes the wiring physically inaccessible), then the demarcation point would move to the first accessible point, but the wiring from that point back to the incumbent’s junction box, perhaps located in a utility closet or in the basement, would still be considered home run wiring subject to those rules. The fact that the Commission’s long-established and sensible rule recognizing that a demarcation point may not be at a point that is “physically inaccessible” may in particular circumstances affect the length of a particular home run wiring loop does not eviscerate the rules applying to such wiring. For example, the same “shortening” would follow if wiring were located behind brick or cinderblock – materials that the Commission has long recognized (and no one here disputes) prevent wiring from being accessible and thus also move the location of the demarcation point. On the other hand, if the rule were changed in the manner that the cable incumbents urge, then, as a practical matter, the home wiring rules would themselves be substantially undermined because competitive providers would not be able to access the demarcation point in order to attach to existing home wiring.

Please do not hesitate to contact me if you have any additional questions concerning this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Dee May". The signature is fluid and cursive, with the first name "Dee" and last name "May" clearly distinguishable.

cc: N. Alexander
S. Bergmann
R. Brioché
M. Carey
R. Chessen
C. Chou Pauze
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